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FILED
MAR 4 1957
JOHN T. FEY, Clerk

Supreme Court of the United States

October Term, 1956

No. 260

JOSEPH CURCIO,

Petitioner,

—against—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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Petitioner respectfully submits this brief in reply to arguments made by the Solicitor General in his Brief for the United States.

The Government asserts that the basic issue before the district court, and consequently before this Court, is a "general legal one". This issue is defined as the privilege against self-incrimination of a custodian of union records who has not produced the union's books pursuant to subpoena and who thereafter asserts a personal privilege with respect to questions touching upon his knowledge of the whereabouts of said books. Thus, the Government seeks to narrow sharply the limits of the issue before this

foregoing basic premise that petitioner's assertion of a personal privilege was in fact only that of a custodian of books and records who, as such, had no such privilege.

Contrary to the opinion of Judge Medina in the Court of Appeals, the Government does not claim now that if petitioner had a personal privilege that he did not fail to make an adequate showing of possible self-incrimination.

The sole issue before the district court was the question of fact of how petitioner's answers to the select questions could possibly incriminate him. The decision of the district court, acting as both judge and jury, was that the answers to the select questions could not possibly incriminate petitioner. It is now as an afterthought that the Government asserts for the first time that petitioner had no privilege with respect to these questions and that the issue is only an issue of law before this Court. It thus appears that the Government is seeking to affirm the judgment of conviction of the district court on a theory materially different from that on which the case was presented to the district court and to the Court of Appeals. This they may not do (*Cole* v. *Arkansas*, 333 U. S. 196, 202).

Moreover, petitioner contends that the issue cannot be narrowed to the extent sought by the Government, since the effect of such tactics would be to vitiate petitioner's arguments that due process required that he be given a fair hearing in the district court, with an adequate opportunity to produce evidence and witnesses in support of his claim that any answers he might give respecting his knowledge of the whereabouts of the union books and records would be incriminatory; and that the selection of 15

questions from among several hundred, removed from the context in which they were originally asked, without furnishing petitioner a complete transcript of his testimony before the Grand Jury, would result in a derogation of his constitutional rights under the Fifth Amendment.

Petitioner testified before the Grand Jury that he did not have in his possession or under his control any of the books and records called for at the time he was served with the subpoena *duces tecum* (R. 67). Petitioner at no time asserted that he had a privilege by virtue of his being a custodian of union books and records. The privilege he asserted was a personal privilege with respect to the questions touching upon his knowledge of the whereabouts of the union books and records. It is a matter of significance that petitioner received two subpoenas requiring his attendance before the Federal Grand Jury; one subpoena *duces tecum* requiring the production of union books and records (R. 48-49), and one personal subpoena (R. 47). Both subpoenas required petitioner's testimony with respect to "an alleged violation of Section 371, Title 18 U. S. C." (R. 47).

Each of the cases relied upon by the Government in its Brief are based upon factual situations quite different from the facts in this case. In nearly all of these cases the contemnor refused to produce books and records in response to subpoenas *duces tecum* only. The varying reasons given in the various cases for these refusals were based upon arguments that the records contained incriminatory matter, or that they would incriminate others besides the contemnor. In one instance the Court's decision rested on a holding that the contemnor had waived the

privilege against self-incrimination by giving some testimony with respect to books and records which had not been produced (*Rogers* v. *United States*, 340 U. S. 367).

It is to be noted that in the case of *Wilson* v. *United States*, 221 U. S. 361, the petitioner refused to produce corporate books and records in response to a subpoena *duces tecum* on the ground that said books contained matters which would incriminate him personally. The Court, by Mr. Justice Hughes, pointed out that petitioner had no privilege with respect to corporate books and records and then stated (p. 377):

> "There is no question, of course, of oral testimony, for he was not required to give any."

Thus, it is apparent that the ground of the Court's decision affirming a commitment for contempt was that petitioner as custodian had no privilege to refuse production of corporate books and records although their contents tended to incriminate him. No personal questions or personal interrogation was required or sought under the terms of the subpoena *duces tecum* served upon petitioner. This is far different from this case. The *Wilson* case is the fountainhead of authority on this subject and the case basic to the Government's proposition that as a matter of law petitioner had no personal privilege with respect to the production of union books and records.

In *United States* v. *White*, 322 U. S. 694, a subpoena *duces tecum* only was served on petitioner, and following the reasoning in the *Wilson* case the court held that a custodian of union books and records, similarly to a custodian of corporate books and records, had no personal privilege

with respect to such records and could not *refuse* to produce these records. But in no instance did these cases turn upon testimony relating to the assertion of a personal privilege as to questions touching the petitioners' knowledge of the whereabouts of such records.

We acknowledge the general rule of law that a custodian of union books or corporate records cannot complain if these books and records contain entries which might incriminate him. In those instances the books furnish the incriminating evidence and not the verbal testimony of the witness. We do contend, however, that this Court has always construed the Fifth Amendment broadly on the ground that compelling a person to convict themself is "contrary to the principles of a free government and abhorrent to the instincts of an American."

In the instant case, the Government loses sight of the fact that this petitioner was served with two separate subpoenas. Thus he was subpoenaed both personally and as an officer of the union to testify to certain matters. The sweeping and thoroughgoing interrogation of petitioner cannot be dissected and fitted into separate groups, and say that as to some questions there was a question of fact, and as to others the petitioner in his capacity as a custodian had no privilege because as a matter of law he was obliged to answer the questions though they might incriminate him. We cannot see how the hunt for possible violations of law against this petitioner could be so split up.

The Government states, at page 35 of its Brief, that if petitioner had a personal claim of privilege in regard to the questions, the possibility of self-incrimination existed under the rule of *Hoffman* v. *United States*, 341 U. S. 479.

In view of this concession, we cannot see how you can make this concession in one breath and then disregard it completely and claim that petitioner had no privilege.

An examination of the complete interrogation of petitioner on his several appearances before the Grand Jury concededly discloses that petitioner was asked a great many questions not touching upon his knowledge of the whereabouts of the union books and records. It was in this setting that petitioner exclaimed:

> "The Witness: They are leading up to something; well, I would like to know what to do." (R. 85)

The removal of the proceeding from the grand jury room to the district court room should not be permitted to act as the lever whereby constitutional rights may be transformed at the election of the Assistants United States Attorney in charge of this case. Moreover, we cannot see how petitioner can be adjudged guilty of contempt on the ground that the questions were not incriminating; then, on appeal, concede that the questions were incriminating but claim that petitioner had no privilege in respect thereto.

The Government suggests that the select questions asked petitioner required his answer since they were merely auxiliary questions properly put in view of petitioner's status as custodian of the union books and records. The Government argues, at page 28 of their Brief, that petitioner could have been convicted "not for failure to answer questions as to the books' whereabouts, but simply for failure to produce them". Such conviction could be established *prima facie* by proof of service of a valid subpoena *duces tecum* upon petitioner requiring the production of

books and records within his control and his failure to produce these books and records. In support of this argument the Government cites the cases of *United States* v. *Bryan*, 339 U. S. 323, and *Lopiparo* v. *United States*, 216 F. 2d 87 (C. A. 8), cert. denied 348 U. S. 916. In the *Bryan* case the facts were that the petitioner "admitted that the records were in her possession but refused to comply with a subpoena" (p. 325). In the *Lopiparo* case the defendant had been served with a subpoena *duces tecum* as a corporate officer which directed his production of corporate books and records. In response to the question as to whether he had brought the books for the year 1953 with him, defendant claimed a personal privilege and refused to answer any questions about the corporate books. Thereafter, the defendant attempted to find the books but was unable to do so. At a final hearing before the Grand Jury defendant refused to answer questions touching on his knowledge with respect to these records. When asked by the court as to the materiality of his background with respect to the production of the corporate books he, through counsel, attempted to show that he was reputed to be a gangster and notorious underworld character and that he had been interrogated by the Kefauver Committee. The district court did not believe defendant's testimony that he was unable to find the books he was ordered to produce, and the Court of Appeals held the evidence sufficient to sustain the contempt order, with one judge dissenting.

It is to be noted that the Court of Appeals for the District of Columbia Circuit, in the case of *Traub* v. *United States*, 232 F. 2d 43, specifically stated that it refused to follow the *Lopiparo* case (see fn. 14 at 232 F. 2d 43, 48). In the *Traub* case petitioner failed to produce certain rec-

ords before the Federal Grand Jury. He stated that he did not have them in his possession or under his control at the time the subpoena *duces tecum* was served upon him. Nevertheless, he was held in contempt by the court below and on appeal this conviction was reversed and a judgment of acquittal ordered entered. Circuit Judge Bazelon, writing for the Court of Appeals, stated the issue as follows:

> The Government's brief states that the specific question discussed "is the *only* question which appellant is charged with contempt for failing to answer." Yet, it urges, appellant's refusal to answer other questions relating to the existence and location of the missing records is a ground for sustaining the present conviction. The Government explains the apparent inconsistency in its position by the following novel contention: A witness who fails to produce all the papers listed in a subpoena is guilty of contempt unless he demonstrates that he is acting in good faith. This demonstration of good faith requires that he answer questions relating to the existence and location of papers he has not produced even though the answers will incriminate him. In other words, the witness can choose his own brand of hemlock. He can destroy himself either by failing to produce records called for by a subpoena (even if they were not in his possession or control when the subpoena was served); by refusing to answer questions (even if he has claimed the protection of the privilege and there has been no judicial determination that it is not available); or by giving incriminating answers. This view is plainly untenable (232 F. 2d 43, 48)

In conclusion, petitioner desires to reiterate the fundamental proposition that constitutional rights cannot be

decided in vacuum; that they must be broadly construed to afford the maximum protection for individuals who are potential criminal defendants. Any narrowing, restriction or other impairment of constitutional rights of one individual is a destruction of the rights of all (*United States* v. *Gordon*, 236 F. 2d 916, 920). For all of the foregoing reasons, the judgment of the court below should be reversed and a judgment of acquittal ordered entered in favor of petitioner.

Respectfully submitted,

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March 1957.